

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Children's Television Obligations of Digital)	MM Docket No. 00-167
Television Broadcaster)	

COMMENTS OF CHILDREN'S MEDIA POLICY COALITION

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SUMMARY

The Children's Media Policy Coalition urges the Commission to promptly adopt public interest requirements for digital broadcasters that will ensure that children's educational and informational needs are met through programming, parents have the information they need to help their children make appropriate viewing choices, and children's advertising rules and policies are updated to take account of the additional capabilities of digital television.

The current guideline of three hours per station per week of children's educational/informational ("E/I") programming is not enough to satisfy the diverse programming needs of children of various age groups and backgrounds. To increase the amount and diversity of E/I programming for children, the Commission should adopt a specific quantitative guideline. The Coalition offers two approaches detailed in earlier comments: 1) adopt a guideline that three percent of broadcaster's total programming should be E/I programming giving broadcasters flexibility concerning the program stream; or 2) retain the three-hour guideline for the "primary" channel, but require additional service to children which could take the form of additional E/I programming, educational datacasting or financial support for noncommercial educational children's programming. Moreover, because research suggests that interactive digital television has substantial educational potential, the Commission should encourage the use of interactivity to enhance E/I programming.

The Commission should also ensure that its cable must-carry requirements do not inadvertently work at cross-purposes with any children's programming guideline. Because the Commission has determined that cable operators will only be required to carry a single, "primary video" program stream and has tentatively decided against requiring carriage of both analog and digital programming during the transition, E/I programming shown on a non-primary channel

may not be available to children in cable households. The Commission should modify the must carry rules to ensure the availability of E/I programming to all children. It should also require cable systems to carry all E/I programming aired by public television stations.

Digital television should also be used to help parents find E/I programming and avoid inappropriate content. Inconsistent or hard-to-see onscreen icons and incomplete or incorrect *TV Guide* listings make it difficult to identify E/I programming. The Commission should require onscreen information links that would give parents detailed information about the educational nature of the programming. The Coalition also encourages the Commission to require broadcasters to spend at least 3% of the time they spend promoting their programming to promoting E/I programming.

Digital television's capabilities should also be used to remedy shortcomings of the television ratings system and V-Chip. New studies show an increasing amount of violence on television and document the harms associated with violent content. Yet, many people do not understand the television ratings, and few know about or use the V-Chip. To promote the development of more effective tools for parents, the Coalition urges the Commission to establish an advisory committee. The advisory committee could consider whether and how to 1) implement an informational link to provide more information about the ratings, the reasons for a program's rating and how to use the V-Chip; 2) revise the ratings system to make it more accurate and easier to understand; and 3) devise technical standards for DTV that permit the V-Chip system to be improved and support multiple rating systems.

Finally, children's advertising protections must be updated for digital television. Interactive games and promotions on digital television will have the ability to lure children away from regular programming and encourage them to spend a long time in an environment lacking

clear separation between content and advertising. Interactive technology may also allow advertisers to collect vast amounts of information about children's viewing habits and preferences and to target advertising based on that information.

To provide a clear separation and to limit advertising exposure, the Commission should prohibit links from children's programs to commercial websites. The Commission should also prohibit the collection of information about children and their viewing habits without affirmative parental consent. This proposed rule is consistent with and expands upon the Children's Online Privacy Protection Act (COPPA). The Commission should also adopt a prohibition on direct sales to children by means of interactive television. Easy "click through" ordering, combined with children's more impulsive behavior and the enhanced ability to target children based on their individual interests, will virtually guarantee that children will make unauthorized purchases unless the Commission steps in to prevent such sales.

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Children Now, the Center for Media Education ("CME"), American Academy of Pediatrics, American Academy of Child and Adolescent Psychiatrists, American Psychological Association, Action Coalition for Media Education, Mediascope, The National Education Association, and The National PTA (hereinafter "Children's Media Policy Coalition" or "Coalition"), welcome the opportunity to provide additional comments concerning the public interest obligations of DTV broadcasters with respect to children. Many members of the Children's Media Policy Coalition filed extensive comments in response to the 2000 *Notice of Proposed Rulemaking* in the proceeding concerning the Children's Television Obligations of Digital Broadcasters.¹ We continue to support the proposals made in the earlier comments and

¹*Children's Television Obligations of Digital Television Broadcasters*, Notice of Proposed Rulemaking, 15 FCC Rcd 22,946 (2000) ("*Children's DTV NPRM*"). See Comments of Children Now (filed Dec.15, 2000)("Children Now Comments"); Comments of CME, Access for All, American Academy of Child and Adolescent, American Psychological Association, William R. Beardslee, M.D., Center for Commercial-Free Public Education, Center for Science in Public Interest, Coalition for Quality Children's Media, Consumer Federation of America, Citizens for Independent Public Broadcasting, Concerned Educators for a Safe Environment, Daniel Corley, Dads and Daughters, William J. Doherty, Ph.D., Leon Eisenberg, M.D., Ronald Hoffman, Ph.D., Junkbusters Corp., Jean Kilbourne, Ph.D., Velma Lapoint, Ph.D., Diane E. Levin, Ph.D., Karen Lewis, M.PH., Susan Linn, ED.D., Robert McChesney, Ph.D., Media Education Foundation, Mark Crispin Miller, Ph.D., Motherhood Project, National Alliance for Non-Violent Programming, National Association for Elementary School Principals, National Association for Family and Community Education, National Black Child Development Institute, National Coalition on Television Violence, National Education Association, National Institute of Media and the Family, National PTA, New Mexico Media Literacy Project, Alvin F. Pouissant, M.D.,

urge their prompt adoption. In these comments, as we respond to the Commission’s invitation to update our proposals in light of more recent developments.² We support the Commission’s “goal to bring these proceedings concerning the public interest obligations of broadcasters in the digital environment to conclusion promptly in order to provide certainty to broadcasters and the public as the digital television transition continues.”³

I. CURRENT CHILDREN’S PROGRAMMING GUIDELINES SHOULD BE REVISED TO ENSURE THAT ALL CHILDREN BENEFIT FROM THE INCREASED CAPABILITIES OF DTV

The Children’s Television Act of 1990 (CTA) imposed an affirmative obligation on every broadcaster to serve “the educational and informational needs of children through the licensee’s overall programming, including programming specifically designed to serve such needs.”⁴ In the *Children’s DTV NPRM*, the Commission noted that “the objectives of the CTA—*e.g.*, to increase the amount of educational and informational broadcast television programming available to children and to protect children from overcommercialization of programming—would apply equally to the digital broadcasting context.”⁵ Thus, it “conclude[d] that digital broadcasters are subject to all of the CTA’s commercial limits and educational and informational programming requirements.”⁶ The question that remains to be answered, however, is how these obligations apply to the digital environment.

Public Advocacy for Kids, Juliet Schor, Ph.D., John Surr, Betsy Taylor, and the Television Project (filed Dec.15, 2000) (“CME Comments”).

² *Second Periodic Review of the Commission’s Rules and Policies Affecting the Conversion to Digital Television*, Notice of Proposed Rulemaking, MB Docket No. 03-15, at ¶ 112, (rel. Jan. 27, 2003) (“*Second Periodic Review*”).

³ *Id.*

⁴ 47 U.S.C. § 303b (a)(2).

⁵ *Children’s DTV NPRM*, 15 FCC Rcd at 22,951.

⁶ *Id.*

The goal of the Commission should be to establish digital television policies that better serve children's needs by increasing the amount and diversity of core educational and informational programming designed for children ("E/I programming"). It is also essential to give broadcasters a clear indication of what is expected of them as they transition to digital television.

In previous comments, Coalition members proposed requirements with these goals in mind. Children Now urged the adoption of a children's core educational and informational programming ("E/I") guideline of three percent of broadcaster's total programming based on a proportional quantification of the current requirements.⁷ Under this guideline, broadcasters would have the flexibility to air children's E/I programming on one or more SDTV channels, a single HDTV channel, or some other combination. CME *et al.* proposed keeping the three-hour guideline for the "primary" channel, but would require additional service to children (measured according to a point system), which could take the form of additional E/I programming, educational datacasting, or financial support for noncommercial educational children's programming.⁸

⁷ Children Now Comments at 6-14. Percentage-wise, this is the equivalent to the existing three hour requirement, as three hours out of a current 105 hour programming week amounts to roughly 3%.

⁸ CME Comments at 8-16. The point system would provide broadcasters with a set of flexible options for fulfilling their public interest obligations. Under this proposal, the FCC would credit a broadcaster with points for (1) airing additional E/I programming; (2) funding children's educational programming on a local public TV station; and/or (3) providing "non-broadcast efforts" such as datacasting for local schools. Extra credit could be awarded for interactive E/I programming and locally-originating or locally-oriented E/I programming.

A. The Current Three Hour Children's Programming Guideline Does Not Result in Sufficient E/I Programming

In prior comments, Coalition members showed that while the three-hour processing guideline was a significant improvement over the prior lax enforcement of the CTA, it did not result in programming fully addressing children's diverse educational and information needs.⁹

Children in the United States are greater in number and in cultural and ethnic diversity than ever before. According to the 2000 Census, there are 72.3 million children under the age of eighteen in the United States. Children of color accounted for 39% of this population in 2000, compared to 31% in 1990.¹⁰ Approximately twenty-seven million children (38%) live in families with incomes below 200% of the federal poverty level.¹¹

Moreover, television is an extraordinarily powerful and ubiquitous medium for the nation's children. On average, children watch almost three hours of television per day; more than half of all kids (53%) have a television in their bedroom.¹² Moreover, virtually all children watch television before their first exposure to formal education. For example, nearly 70% of day care facilities have a TV on for several hours each day.¹³ By the time most American children finish the first grade, they will have spent the equivalent of three school years in front of the TV.¹⁴

⁹ CME Comments at 7.

¹⁰ William P. O'Hare, Anne E. Casey Found., *The Child Population: First Data From the 2000 Census 2* (June 2001) available at http://www.aecf.org/kidscount/trends_children.pdf. (Baltimore, MD: The Annie E. Casey Foundation and Population Reference Bureau, June 2001).

¹¹ Annie E. Casey Found., *Kids Count Census Data Online*, at <http://www.aecf.org/cgi-bin/aecensus.cgi?action=profileresults&area=1#3> (last visited Apr. 21, 2003) (citing U.S. Census Bureau Data).

¹² Donald F. Roberts et al., Kaiser Family Found., *Kids & Media @ the New Millennium 2* (1999), available at <http://www.kff.org/content/1999/1535/>.

¹³ Benton Found., *The FCC Gives Teeth to the Children's Television Act of 1990*, at <http://www.benton.org/Policy/TV/kidstv-sum.html> (last revised Dec. 17, 1996).

¹⁴ *Id.*

Three hours per station per week of E/I programming is not enough to satisfy the diverse programming needs of children of different age groups and backgrounds.¹⁵ While PBS provides some of the best children's E/I programming, it alone cannot meet the needs of all children. A recent study identified several shortcomings in the PBS Kids' lineup:

Public broadcasting's national content must examine, explore and reinforce – not simply reflect – American diversity. Currently, PBS Kids is heavily weighted toward animated fiction. It will be difficult to present themes of cultural diversity with sufficient depth and context without additional live-action and non-fiction content.¹⁶

The study concluded that “PBS Kids needs greater genre diversity. It is impossible to imagine PBS prime time without live action drama, without news or current affairs, without examination of American, world and popular cultures. Yet, these are major gaps in the PBS Kids lineup.”¹⁷ The PBS/Markle Report found that: “Post-September 11 research for PBS by its advertising agency stated it clearly: globalism is now a forced perspective. Yet, almost no U.S. television programming explores or contrasts how young people live elsewhere in the world.”¹⁸

Instead of fulfilling these unmet program needs, the commercial broadcast networks have been cutting back on the diversity of their E/I and other children's programming. Indeed, NBC executives have indicated that they “probably would have programmed [Saturday mornings] with something else” besides children's programming.¹⁹ Over the last two years, the networks have “subleased” their Saturday morning time blocks to cable channels or production houses to program it for them. For example, Nickelodeon programming runs on CBS; ABC airs shows

¹⁵ *Id.*

¹⁶ David Kleeman, American Center for Children in the Media, *One Mission, Many Screens: A PBS/Markle Foundation Study on Distinctive Roles for Children's Programming in the Digital Age* 8 (Apr. 17, 2002).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Meg James, *Discovery to Fill NBC's Saturday Morning Lineup*, LA Times, December 7, 2001, at C4.

from the Disney Channel, ABC Family, and Toon Disney; and Discovery Kids fare can be found on NBC.²⁰ This increasing “repurposing,” or sharing between cable and broadcast partners, diminishes the amount of original programming available to children.

**B. The FCC Must Require Broadcasters to Provide
More E/I Programming to Ensure that DTV Serves
the Public Interest**

In light of the continuing unmet needs of the child audience and the expanded capabilities of digital broadcasters, the Coalition strongly urges the Commission to clearly establish the principle that any increase in multicasting channel capacity that broadcasters choose to implement should translate to a commensurate increase in the amount of programming available to children. It is still somewhat unclear how digital broadcasting will evolve. To our knowledge, no commercial television stations that have converted to digital have used the new capability to serve children. Public television stations in New York and Cincinnati, on the other hand, have launched children’s digital channels.²¹ It is important, however, that broadcasters know how they will be expected to do more to meet children’s needs in the future. It is also important that whatever additional requirements imposed are concrete and quantifiable. History shows that merely exhorting broadcasters to do more for children does not result in increased educational and informational programming for children.²²

²⁰ While Fox does not have a deal with a cable network, it does have a four-year deal valued at \$100 million with 4 Kids Entertainment which gives the toy-licensing company the right to retain all revenue from network advertising sales during the Saturday morning time period. Cynthia Littleton, *DIC Still in Fox Game with 4 Kids Side Deal*, Hollywood Reporter, Jan. 23, 2002, at C4.

²¹ *Thirteen Launches Kids Thirteen*, Business Wire, July 11, 2002; John Kiesewetter, *WCET Expands to Four Digital Cable Channels*, Cincinnati Enquirer, April 11, 2003, at 1E.

²² For example, although the Commission stated in its *1974 Policy Statement* that it expected broadcasters to make a “meaningful effort” to provide “reasonable amount[s]” of educational

Adoption of a 3% proportional guideline of required children's programming or a point system to require more from broadcasters than three hours of programming, as advocated in the Coalition's prior comments, will provide the necessary guidance to broadcasters, while still affording them flexibility.

C. The Commission Should Encourage the Use of Interactivity to Enhance the Value of E/I Programming

In prior comments, both Children Now and CME *et al.* sought to encourage interactivity in children's E/I programming. Children Now suggested that broadcasters should provide interactive children's programming equal to the percentage of interactivity in their other programming.²³ CME proposed giving extra credit under the point system for broadcasters who aired interactive children's programming.²⁴

Educators have begun to develop models for interactivity in digital television. For example, researchers at the Massachusetts Institute of Technology tested interactive technology to give parents information so that they could help their children learn more from educational programming.²⁵ Moreover, recent research has found that interactive components in technology

programming for different age groups, 50 FCC 2d at 5, broadcasters failed to increase the amount of educational programming. 2 *Television Programming for Children: A Report of the Children's Television Task Force* 18, 23, 25 (Oct. 1979). Similarly, the rules adopted in 1991 to implement the CTA merely required broadcasters to air "some" educational and informational programming, but did not require any specific amount. The Commission found that most broadcasters responded by airing only one half-hour of such programming. *Policies and Rules Concerning Children's Television Programming*, 11 FCC Rcd 10,660, 10,680 (1996). Indeed, it was the lack of educational and informational programming for children and the failure of the market forces to increase this amount that led the FCC to adopt the three-hour guideline. *Id.* at 10,674-82.

²³ Children Now Comments at 16-22.

²⁴ CME Comments at 11-12.

²⁵ Tamara Lackner, Massachusetts Institute of Technology, *Enhancing Children's Educational Television with Design Rationales and Justifications* (June 2000). This paper describes a system which sends messages to parents about the television shows their children watch. It explores

have the potential to increase children's ability to learn collaboratively.²⁶ Where interactive games have been designed to teach certain skills, they have been found to be highly effective learning tools.²⁷ This research suggests that interactive digital television has substantial educational potential and should be encouraged by the FCC.

II. THE COMMISSION MUST ADOPT DIGITAL CABLE CARRIAGE RULES THAT DO NOT UNDERMINE THE AVAILABILITY OF CHILDREN'S EDUCATIONAL /INFORMATIONAL PROGRAMMING

Not only should the Commission adopt a guideline or a point system that will provide incentives for broadcasters to offer a larger quantity of children's E/I programming, more diverse E/I programming, and interactive learning opportunities, but it must ensure that its cable carriage requirements do not inadvertently work at cross-purposes with these children's television incentives. The *NPRM* in the *Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television* states that the Commission is "interested in whether our approach to multicast public interest obligations should vary with the scope of whatever final digital must-carry obligation the Commission adopts."²⁸

In January 2001, the Commission issued its *First Report and Order and Further Notice of Proposed Rulemaking* in a proceeding designed to address the numerous issues relating to the

ways that television can be assimilated with digital technology to help parents learn strategies for conversing with their children and then enhance the educational value of the program.

²⁶ Ellen Wartella *et al.*, Markle Found., *Children and Interactive Media—Research Compendium Update* (Nov. 2002), available at http://www.markle.org/news/interactive_media_update.pdf (last accessed Apr. 20, 2003) ("*Markle Foundation Study*").

²⁷ Subrahmanyam *et al.*, *New Forms of Electronic Media: the Impact of Interactive Games and the Internet on Cognition, Socialization and Behavior*, in *Handbook of Children and the Media*, 73-99 (Dorothy G. Singer & Jerome L. Singer eds., 2001).

²⁸ *Second Periodic Review* at ¶ 112.

carriage of digital television broadcast signals by cable operators.²⁹ In the *Must Carry Order*, the Commission determined that once the transition to digital television was complete, cable operators would only be required to carry a single, “primary video” program stream to be designated by the broadcaster.³⁰ Thus, a broadcaster choosing to multicast would have no guarantee that more than one channel would be carried by local cable systems.³¹

A. The Must Carry Rules Should be Modified to Ensure Carriage of Children’s E/I Programming

If not changed, the Commission’s definition of “primary video” will undermine the programming proposals of a 3% guideline or an additional point system. Because each proposal would give the broadcasters flexibility to air children’s E/I programming on any program stream, including a specialized children’s channel, it is likely that E/I programming would not be carried on the “primary stream.” Thus, cable operators would not be required to carry the broadcaster’s E/I programming, and the percentage of children who live in households that subscribe to cable would not have access to this programming.³²

²⁹ *Carriage of Digital Television Broadcast Signals*, First Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 2598 (2001) (“*Must Carry Order*”).

³⁰ *Must Carry Order* at ¶ 57. The Commission did not reach a final decision about what carriage requirements would apply during the transition, that is, during the period when broadcasters are transmitting programming in both analog and digital formats. However, it tentatively concluded that requiring cable systems to carry both would violate the First Amendment, while it sought additional information to help it better assess the issue. *Id.* at 2647.

³¹ Commercial broadcasters would be free to negotiate retransmission consent for additional programs or program streams, but it seems unlikely that broadcasters will be able to negotiate carriage of many additional program streams. *See, e.g.*, Letter from APTS CPB, & PBS sent to FCC Chairman Michael K. Powell (Feb. 27, 2003) (“*APTS Letter*”).

³² Approximately 65% of households subscribe to cable. *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Ninth Annual Report*, 17 FCC Rcd 26,901, 26,910 (2002). Additionally, the 20.3% of households that subscribe to DBS will not be able to get access to this programming.

Lack of cable carriage could also have a negative impact on the quality of children's programming. If a large number of children are unable to watch E/I programming, broadcasters will lose the financial incentive to develop quality children's programming.

Thus, depending on which proposal the Commission adopts, it will need to modify the must carry rules accordingly. Should the Commission adopt the 3% guideline, it should amend the must carry rules to require cable operators to carry all children's E/I programming, regardless of what stream it is on. Requiring cable operators to carry all children's E/I programming would ensure that all children have access to this programming, while still giving broadcasters the flexibility to broadcast other programming simultaneously.³³ Although this proposal could require cable operators to carry more than a single programming stream, the benefit of making such programming available to children clearly outweighs the minimal additional burden on cable operators.³⁴ If the Commission decides to adopt a point system, it should only give points for children's E/I programming that is carried on cable.

The Commission can also address the problem of preemption by amending the must carry rules to require carriage of all children's E/I programming. In its earlier *NPRM*, the Commission suggested that preemption of core programming would be less of a problem with DTV because children's programming could simply be shifted to another program stream.³⁵ However, if shifting children's programming to a different stream would make it impossible for children in

³³ The alternative of adopting a guideline that looks only at the a percentage of children's E/I programming on the primary channel is less desirable because it gives the broadcasters' less flexibility and discourages broadcasters from airing additional amounts of E/I programming.

³⁴ In the *Must Carry Order*, the Commission expressed concern over the constitutionality of possible cable carriage requirements. 16 FCC Rcd at 2648. The government interest of providing an adequate amount of quality children's programming to the public outweighs the small burden on broadcasters according to the balancing test used in *Turner Broad. Sys., Inc. v. F.C.C.* 512 U.S. 622 (1994).

³⁵ *Children's DTV NPRM*, 15 FCC Rcd at 22,957.

cable homes to view it, the preemption problem would not be solved. Thus, cable operators should be required to carry all children's E/I programming regardless of the program stream on which it is broadcast.

B. The Commission Should Ensure that Interactive Features in Children's Educational Programming Will Be Carried on Cable Television

The *Must Carry Order* did not decide what interactive features cable operators would be required to carry. It defined primary video as "a single programming stream and other program-related content."³⁶ It further identified some services, such as closed captioning and ratings used for the V-Chip, that were sufficiently related to the primary programming to be entitled to carriage.³⁷ In general, the Commission would continue to use the three factors enumerated in *WGN Continental Broadcasting v. United Video, Inc.* to decide what constitutes program related material in the digital age.³⁸

In the *Further Notice*, the Commission asked for further comment on the scope of "program-related" content for purposes of mandatory cable carriage.³⁹ Some of the examples it seeks comment on—multiple camera angles, providing complementary information, playing

³⁶ *Must Carry Order*, 16 FCC Rcd at 2622.

³⁷ *Id.* at 2624. On the other hand, Internet-based services such as e-commerce applications, it stated that cable operators likely would not be required to carry these services unless the broadcaster could demonstrate that it was "program related." *Id.* at 2623. As discussed *infra*, the coalition does not think that e-commerce applications have any place in children's programming. However, should such applications be permitted, we would agree that the cable operators should not be required to carry them.

³⁸ *Must Carry Order*, 16 FCC Rcd at 2623-24. The three factors are: 1) whether it was intended to be seen by the same viewers as were watching the programming, 2) whether it was intended to be seen during the same time in which the programming was broadcast and 3) whether it was an integral part of the programming. *WGN Cont'l. Broad. v. United Video, Inc.*, 693 F.2d 622, 626 (7th Cir. 1982).

³⁹ *Must Carry Order*, 16 FCC Rcd at 2651-52.

along with a game, and chatting during a TV program—could well be used in children’s E/I programming.

Because educational interactive components would provide children with new and exciting ways to learn and are an integral part of the program, cable operators should be required to carry educational interactive components under the *WGN* test. First, educational interactive features are intended to be seen by the same viewers as are watching the program, because a viewer must be watching the program to become interested in a link to the interactive content. Second, educational interactive content is intended to be used simultaneously so the child or parent can better understand the material that is being presented in the television programming. Also, educational programming is designed to be integral to the content of the programming. To avoid any confusion, the Commission should clarify that cable operators are required to carry any interactive enhancements on children’s E/I programming.

C. All Programming on Public Television Should be entitled to Mandatory Cable Carriage

The *Must Carry Order* states that the digital signals of non-commercial stations will be treated the same as their commercial counterparts.⁴⁰ As explained above, this means that if a public television station decides to multicast, the cable operator need only carry the primary video stream, that is a single programming stream plus any programming-related content. Moreover, the Commission has not required carriage of both analog and digital signals during the lengthy transition period.

These decisions could have a devastating effect on the availability of children’s educational programming. It is beyond question that public broadcasters have provided far

⁴⁰ *Id.* at 2608.

superior service to children in the analog environment.⁴¹ Moreover, public broadcasters are leading the way in creating quality digital educational programming. For example, Channel Thirteen in New York and WCET in Cincinnati, Ohio are broadcasting 24 hours of children's digital television on multicasted channels.⁴²

Public broadcasters have spent the past two years attempting to negotiate dual carriage agreements with cable carriers for the digital transition. Yet, they have only succeeded in negotiating dual carriage agreements with two cable operators, Time Warner and Insight Communications, which cover only about 20% of cable viewers.⁴³ To enable public broadcasters to continue to serve the needs of children, the Commission should require that cable operators carry all children's E/I programs aired by public broadcasters whether analog or digital, and regardless of which program stream it is on.

Not only would this result best serve the public, but the Commission also has legal authority to mandate it. As to dual carriage during the transition, the *Must Carry Order* found that the statute neither compelled nor prohibited dual carriage, and the Commission's tentative conclusion not to require dual carriage turned on its assessment that the governmental interest in giving the public access to all broadcast television programming via cable did not justify the burdens imposed on cable operators.⁴⁴ However, the balance is different in the case of children's E/I programming. The clear benefits of making E/I programming widely available to children

⁴¹ What makes public broadcasting unique is that it does not rely on the commercial system for funding, and so non-commercial stations can provide quality educational programming to all ages and background regardless of commercial concerns. See, e.g., David Kleeman (American Center for Children in the Media), *One Mission, Many Screens: A PBS/Markle Foundation Study on Distinctive Roles for Children's Programming in the Digital Age* 8 (Apr. 17, 2002).

⁴² *Thirteen Launches Kids Thirteen*, Business Wire, July 11, 2002; John Kiesewetter, *WCET Expands to Four Digital Cable Channels*, Cincinnati Enquirer, April 11, 2003, at 1E.

⁴³ *APTS Letter* at 2.

⁴⁴ 16 FCC Rcd at 2649.

outweigh any burden on the cable operators from carrying this relatively small amount of programming.

Moreover, the 1992 Cable Act provides authority for the Commission to define the program carriage requirement for noncommercial educational television stations in a different manner than for commercial stations. As the Commission observes in the *Must Carry Order*, different statutory provisions govern commercial and non-commercial must carry.⁴⁵ Specifically, Section 615(g), which defines the content to be carried by non-commercial stations, states that cable operators shall carry “program- related material ... that may be necessary for receipt of programming by handicapped persons or for *educational* or language *purposes*.”⁴⁶ The *Further Notice* seeks comment on whether this language means that if an NCE station multicasts programming for “educational” purposes, the cable operator should carry all program streams.⁴⁷ If a public broadcaster decides to devote all or part of a programming stream to children’s educational programming, clearly that programming serves an “educational purpose” and should be entitled to carriage.

III. DIGITAL TELEVISION SHOULD BE USED TO BETTER EDUCATE PARENTS ON CORE PROGRAMMING AND TO HELP CHILDREN AVOID INAPPROPRIATE MATERIAL

The Children’s Media Policy Coalition urge the Commission to require that digital television capabilities be used to help parents find programming that is beneficial for their children and to avoid programming they find inappropriate for their children.

⁴⁵ *Id.* at 2652.

⁴⁶ This section is codified at 47 USC § 535(g)(1) (emphasis added).

⁴⁷ *Must Carry Order*, 16 FCC Rcd at 2652.

**A. Broadcasters Should Do More to Let Parents Know
About the Availability of E/I Programming**

In their prior comments, both Children Now and CME identified the need to better inform parents about E/I programming and suggested several ways to do this.⁴⁸ The Children's Media Policy Coalition continue to believe that the Commission should adopt specific requirements to help parents learn about E/I programming and be able to find it more easily.

Finding core programming continues to be difficult. Although the Commission found in its three-year review of the Children's Television Act that most television stations were supplying program guides with information identifying each core program aired,⁴⁹ many newspapers are not including this information in their program listing.⁵⁰

Since parents cannot rely on television listings, the only other way to identify E/I programming is to hope to see the onscreen identifier. While the Commission rule requires stations to identify E/I programming at the beginning of the program, the form is left to the "discretion of the licensee."⁵¹ Children Now's review of E/I programs in Los Angeles found that

⁴⁸ Specifically, Children Now urged the Commission to encourage broadcasters to adopt an onscreen informational link that identifies core programming and, when activated, explains what core programming is, gives an age range recommended for the program, and provides a synopsis of how the show meets the Commission's educational and informational requirements. Children Now Comments at 22-24. Children Now also asked the Commission to consider encouraging broadcasters to spend 3% of the time they spend promoting other programming on promoting core programming or on discussing the value of educational and informational programming generally. *Id.* at 30-31. CME asked the Commission to require broadcasters to use a standardized E/I icon and to air public service announcements about the meaning of the icon. CME also suggested amending the definition of E/I programming to include "adequate promotion" as a core element. CME Comments at 46-48.

⁴⁹ FCC, Mass Media Bureau, *Three Year Review of the Implementation of the Children's Television Rules and Guidelines 1997-1999*, at ¶ 44 (Jan. 2001).

⁵⁰ For example, the *Washington Post's TV Week* does not identify any programs as E/I, nor does it include ratings, but it does use letters to indicate if a program is new (N) or closed captioned (CC).

⁵¹ 47 CFR § 73.673(a).

each network uses a different icon.⁵² Some do not include the “E/I” letter designation at all. For example, one of ABC’s core programming icons is a light bulb that, when turned on, sprouts a propeller as the announcer says, “Illuminating television.” Moreover, the icons are often hard to see.⁵³ Finally, it is easy to miss these icons because they appear on the screen for only a short time at the beginning of a program.

Because E/I programming is neither well marked onscreen nor consistently listed in program guides, the Children’s Media Policy Coalition strongly urges the Commission to take the additional steps detailed in earlier comments to increase public awareness of the availability and location of core programming.⁵⁴ Specifically, the Commission should amend the rules to require stations to use a standardized E/I icon, to prominently display the icon for a specific period of time, and to include links from the icons that would provide additional information about the educational value of the program. The Commission should also require stations to air PSAs about E/I programming and to devote 3% of the time devoted to promoting programming to promoting children’s E/I programming.

Furthermore, the Commission must ensure that cable television must carry rules do not undermine these efforts. Specifically, the Commission should clarify that links from the E/I icons are sufficiently related to the primary video stream to be entitled to carriage and it ensures that E/I programs are promoted on program streams carried on cable.⁵⁵

⁵² Children Now, Media Ownership Study (unpublished data) (“*Children Now Study*”). The data was taken from a Los Angeles case study conducted Feb.-March 2003.

⁵³ *Children Now Study*. For example, the Fox icon, which consists of the letters “E/I”, is transparent and difficult to see. *Id.*

⁵⁴ Children Now Comments at 22-28; CME Comments at 41-49.

⁵⁵ *DTV Must Carry Order*, 16 FCC Rcd at 2624. The informational link easily satisfies the three-part *WGN* court test the Commission uses to determine if related material is to be carried by the cable operator. First, the broadcaster intends for the link and its information to be seen by the same viewers watching the video signal since the link educates viewers about the program they

B. Broadcasters Should Do More to Help Parents Avoid Inappropriate Programming and Find Appropriate Programming

While digital television offers the potential to better serve the program needs of children, it also offers the potential of providing larger quantities of programming that may not be appropriate for children.⁵⁶ This problem is compounded by the fact that the current tools available to parents, specifically, the V-Chip and the TV ratings system, have not worked as well as was anticipated. Thus, the Coalition urges the Commission to convene an advisory committee to make recommendations on how to how these tools might be improved upon in the digital environment.

1. Television Already Has Substantial Amounts of Violent and Sexual Content and this is Likely to Increase with DTV

Even without the ability to multicast, violent content on television is increasing. The percentage of broadcast programs with violence increased over the last three years from 53% to

are watching. Second, the link's information is available at during the same interval of time as the video signal. Third, the informational link is an integral part of the program on the video signal. *See Must Carry Order*, 16 FCC Rcd at 2624 (adopting in part factors set forth in *WGN Cont'l. Broad. v. United Video*, 693 F.2d 622 (7th Cir. 1982)).

⁵⁶ DTV has the capability to dramatically increase the quantity of programming available because it allows stations to broadcast more than one program stream at a time. Some stations are already offering more than one program stream to viewers with digital television receivers. For example, Paxson stations in Washington, D.C. and Chicago are already multicasting on the six channels provided by digital technology. Tack Nail, *Group Owners Tell NAB Industry Must "Band Together" for HDTV*, Communications Daily, Apr. 9, 2003. WCYB-DT in Bristol, Va. currently multicasts four digital stations. Digital television viewers receive NBC, the WB network, the PAX network and, on another channel, local news cut-ins for MSNBC, Doppler weather radar, and other various specials. Tom Cupp, *Multicasting is in the Air*, Digital TV Presents DigitalTelevision.com, <http://www.digitaltelevision.com/2001/broadcast/0201.shtml>. WRAL-TV launched the first full-time local news channel in Raleigh, N.C. over digital television and cable. WRAL.com, *WRAL-TV Launches All-News Channel*, <http://www.wral.com/News/944345/>.

67%.⁵⁷ Violence is even more prevalent in children's programming than in other types of programming.⁵⁸ The average child who watches two hours of cartoons a day may see nearly 10,000 violent incidents each year.⁵⁹

Sexual content is also prevalent on television. A recent study by the Kaiser Family Foundation found that 64% of all shows included some type of sexual content, 32% showed sexual behaviors and 14% depicted sexual intercourse.⁶⁰ This study found that although the amount of sexual content on television remains high, especially in the shows most watched by teens,⁶¹ television was doing a "significantly better job of including safer sex messages in shows with sexual content than it has in recent years."⁶²

Many parents are concerned about what their children are watching. A large body of research demonstrates that parents have good reason to be concerned. A recent study by the University of Michigan that tracked 450 participants found a correlation between viewing television violence during childhood and aggressive behavior 15 years later.⁶³ The study showed

⁵⁷ The Henry J. Kaiser Family Foundation, *Key Facts: TV Violence* (Spring 2003), available at http://www.kff.org/content/2003/3335/TV_Violence.pdf (citing Center for Comm. and Soc. Policy, University of California, Santa Barbara, 3, *National Television Study: Executive Summary* (1998) ("CCSP Study")).

⁵⁸ *Id.* (citing Barbara Wilson *et al.*, *Violence in Children's Television Programming: Assessing the Risks*, 52 *Journal of Communication* 5-35 (2002)).

⁵⁹ *Id.* (citing *CCSP Study* at 33-34).

⁶⁰ Dale Kunkel *et al.*, Kaiser Family Found., *Sex on TV3, A Biennial Report of the Kaiser Family Foundation*, Executive Summary, at 8, 2003, available at http://www.kff.org/content/2003/20030204a/FINAL_EX.PDF.

⁶¹ *Id.* at 5.

⁶² *Id.* at 1. The percentage of shows that included at least one scene addressing the risks or responsibilities substantially increased. *Id.* Among shows with sexual content involving teen characters, one in every three shows (34%) includes a safer sex reference, up from 17% two years ago and 18% four years ago. *Id.*

⁶³ L. Rowell Huesmann *et al.*, *Longitudinal Relations Between Children's Exposure to TV Violence and Their Aggressive and Violent Behavior in Young Adulthood: 1977-1992*, 39 *Developmental Psychology* 201, 215-17, (Mar. 2003) available at http://www.apa.org/journals/dev/press_releases/march_2003/dev392201.pdf.

that both boys and girls who watch television violence are more likely to behave violently as they enter adulthood.⁶⁴ Men who were heavy viewers of violent television shows between the ages of six and nine were twice as likely as other men to push, grab, or shove their spouses and three times as likely to be convicted of criminal behavior by the time they were in their 20s.⁶⁵ Women were also affected by heavy viewing of violent television shows as children, and were twice as likely as other young women to have thrown something at their spouse and more than four times as likely as other women to have punched, beaten or choked another adult.⁶⁶

Television violence has long been documented as a problem for young viewers and violent interactive programs and games that could become available on digital television also pose potential problems.⁶⁷ Like television violence, studies have found a link between violent interactive media and aggression in children.⁶⁸ Low self-esteem has also been correlated with violent video game playing.⁶⁹ Furthermore, studies show the strongest correlation between

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Analysts expect downloadable cell phone games to generate more than \$7 billion in revenue by 2008. *Downloadable Cellphone Games will Generate Revenue*, Communications Daily, April 11, 2003, at 11. Currently there are no legal restrictions on the sale or rental of adult video games to children and there is evidence games rated for adults, many with violent content, are marketed and sold to children. David Walsh, National Institute on Media and the Family, *Sixth Annual Video and Computer Game Report Card*, Minneapolis (Dec. 13, 2001), available at http://www.mediaandthefamily.org/research/report_vgrc_2001-2.shtml. In fact, the Federal Trade Commission and Department of Justice found that the movie, music recording, and video game industries were advertising and marketing adult material to children under 17. See FTC, *Marketing Violent Entertainment to Children: A Review of Self-Regulation and Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries* (Sept. 2000), available at <http://www.ftc.gov/reports/violence/violence010423.pdf>.

⁶⁸ Ellen Wartella et al., Markle Found., *Children and Interactive Media—Research Compendium Update* (Nov. 2002), available at http://www.markle.org/news/interactive_media_update.pdf (last accessed Apr. 20, 2003) (“Markle Foundation Study”).

⁶⁹ *Id.* at 22 (citing J.B. Funk et al., *Preference for Violent Electronic Games, Self-Concept and Gender Differences in Young Children*, 70 *American Journal in Orthopsychiatry*, 233-241 (2000)).

aggression and the frequency of play (as opposed to the duration of play or years of play).⁷⁰

Digital television may become one more outlet for children to have access to inappropriate interactive media.

2. The Current Parental Control Measures Are Inadequate

Ideally, parents would use the television ratings system in conjunction with the V-Chip to block access to programming they find inappropriate for their children. In practice, however, this system has not worked as well as had been expected. One problem is that many parents do not understand the ratings system, which includes both age-based and content-based ratings.⁷¹ A survey by the Annenberg Public Policy Center found that only 6% of parents could name one of the ratings for children's programming,⁷² and only 4% correctly identified the meaning of the D content rating.⁷³

This problem is compounded by the fact that many program ratings are either not listed or incorrectly listed in *TV Guide*.⁷⁴ Children Now's recent survey found that only half of the

⁷⁰ *Id.* at 21, (citing J. Colwell & J. Payne, *Negative Correlates of Computer Game Play in Adolescents*, 91 *British Journal of Psychology*, 295-310 (2000)).

⁷¹ Most but not all television programs are rated using 6 age-based ratings: For All Children (TV-Y), Directed to Older Children (TV-Y7), General Audience (G), Parental Guidance Suggested (TV-PG), Parents Strongly Cautioned (TV-14), and Mature Audiences Only (TV-MA). These age-based ratings have been supplemented with content descriptors (FV for fantasy violence, L for language, V for violence, S for sexual situations, and D for sexual dialogue). See Joel Federman, Kaiser Family Found., *Rating Sex and Violence in the Media: Media Ratings and Proposals for Reform*, (Nov. 2002), available at http://www.kff.org/content/2002/3278/media_ratings_report.pdf. (“*Rating Sex and Violence in the Media*”).

⁷² Amy Jordan, Annenberg Public Policy Center of the University of Pennsylvania, *Parents' Use of the V-Chip to Supervise Children's Television Use*, presented at Television and Children's Media Policy: Where Do We Go From Here? (Feb. 28, 2003), available at www.appcpenn.org/reports/2003/parentsuseofvchip.pdf. (“*Annenberg V-Chip Study*”).

⁷³ *Id.* “D” content rating is for suggestive dialogue.

⁷⁴ Moreover, the ratings appear very briefly on the television screen at the beginning of the program.

shows listed in the *TV Guide* included age-based ratings. A 1998 Michigan State Study examining 456 shows found that half of the age- and content-based ratings appearing on air were different or not listed in the *TV Guide*.⁷⁵

Still another problem with program rating is that while the age-based advisories are generally carried by broadcasters, content labels were applied to only one out of five programs that contain violence, sexual material, or adult language.⁷⁶ And even if a show is rated for sexual content, the current ratings system does not differentiate between types of sexual content for parents to determine whether it is appropriate for their own children. Moreover, researchers have found that age-based rating systems create a “forbidden fruit” effect, while content-based ratings do not have the same effect.⁷⁷

Even if parents understand the ratings system, they may not be aware of how to use the V-Chip to block access to inappropriate programming. Many families never use the device because they do not realize they have it.⁷⁸ Moreover, even if a family knows that it has a V-Chip equipped television, programming the V-Chip is a multi-step and confusing process.⁷⁹

⁷⁵ Michigan State University, *Television Rating System Inaccurate Half the Time*, Press Release (June 10, 1999) available at <http://newsroom.msu.edu/news/archives/1999/06/tvratings.html>.

⁷⁶ *Rating Sex and Violence in the Media* (citing Dale Kunkel et al., Kaiser Family Found., *Rating the TV Ratings: One Year Out* 88 (1998)).

⁷⁷ In other words, children tend to prefer programs with ratings that signal a viewing restriction. *Rating Sex and Violence in the Media* at 10 (citing David S. Bickham & John C. Wright, *Television Rating and the Viewing Preferences of Children: A Comparison of Three Systems* 4 (2001)).

⁷⁸ *Annenberg V-Chip Study*. A Kaiser Family Foundation poll found that 53% of parents with a V-Chip equipped television in their homes were unaware of the fact. Kaiser Family Found., *Parents and the V-Chip, 2001: A Kaiser Family Foundation Survey* 1 (July 2001) (“*Kaiser Survey*”), available at <http://www.kff.org/content/2001/3158/V%20Chip%20toplines%202001.pdf>.

⁷⁹ “No fewer than five menus must be navigated and parents must move quickly or programming menus disappear. In addition, parents must be familiar with the symbols for the age based and content based codes. And, once the V-Chip is programmed, the user must lock it with a

3. Digital Television Could be Used to Better Inform Parents about how to Limit Their Children's Access to Programming they Deem Inappropriate

In previously filed comments, Children Now urged the Commission to use digital technology to create an advanced ratings system that provides useful information to parents.⁸⁰ The Coalition agrees that the transition to digital television offers a unique opportunity to improve upon the existing tools. Because the cooperation of many parties is necessary to achieve a better, workable rating system, we urge the Commission to appoint an advisory committee, with representatives from the industry, experts on child development, children's advocates, academics, parents, and others, to consider whether and how such features as those described below might be implemented.

1. An Informational Link for Parents Could Provide More Information About the Meaning of the Ratings, the Basis for a Program's Rating, and How to Use the V-Chip.

Broadcasters could use digital television's ability to transmit information simultaneously with the program to make ratings available throughout the length of a program. Links could provide parents with information on why the show received that particular rating. For instance, under the current ratings system, sexual content could mean simply talking about sex, physical flirting, kissing, intimate touching, or scenes where sexual intercourse is strongly implied. Categorizing the differing degrees of sexual content would assist parents in selecting content that reflect their own values. Furthermore, the link could provide information about how to use the V-Chip (or any other digital parental control feature in use).

password—a final step that several families missed (rendering the programming efforts useless, unbeknownst to them).” *Children Now Study*.

⁸⁰ *Children Now NOI Comments* at 42-43.

2. *The Ratings System Could Be Modified to Make It More Accurate and Easier to Understand.* As shown above, many parents do not understand the current ratings systems for television. As interactive games become available through digital television, parents are likely to become confused if these games have a different ratings system.⁸¹ It may be desirable to develop a combined or uniform system of ratings.⁸² Also, the advisory committee should consider ways to better ensure the accuracy of ratings. Forty percent of parents that use TV ratings systems believe that most shows are not accurately rated.⁸³

3. *Technical Standards for DTV Should Permit the V-Chip System to be Improved and Should Support Multiple Rating Systems.* As we transition to a digital environment, the Commission should use the opportunity to improve upon the current ratings system. The Coalition urges the Commission to adopt flexible technical standards that will allow for future improvements and the possibility of supporting multiple ratings systems.

⁸¹ Currently there are several rating systems for different media. The cable movie channels (Cinemax, HBO, The Movie Channel, and Showtime) use these ratings: Mild Violence (MV), Violence (V), Graphic Violence (GV), Rape (RP), Adult Language (AL), Graphic Language (GL), Brief Nudity (BN), Nudity (N), Adult Content (AC), and Strong Sexual Content (SSC). The Motion Picture Association of America movie ratings are: General Audience (G), Parental Guidance Suggested (PG), Parents Strongly Cautioned (PG-13), Restricted (R), and No One Under 18 Admitted (NC-17). For electronic games, The Entertainment Software Rating Board established a rating system in 1994 with five age-based rating categories: Early Childhood (EC), Everyone (E or K-A), Teen (T), Mature (M), and Adults Only (AO). For a description of the television ratings, see note 71. Of these ratings, TV-Y and TV-Y7 have no counterparts in other genres.

⁸² Some are calling for the entertainment industry to adopt a universal ratings system. See, e.g., David Walsh & Douglas Gentile, *A Validity Test of Movie, Television, and Video-Game Ratings*, 107 *Pediatrics* 1302, 1307 (June 2001) (“Walsh Study”); *Rating Sex and Violence in the Media* at 23.

⁸³ *Kaiser Survey* at 2. One study found evidence of “ratings creep,” where adult material is introduced to products rated for younger audiences. It found that half of the television shows rated “appropriate for teenagers” had material that was not recommended for them. It also found “a similar disconnect between industry ratings and parent ratings in that 38% of the TV-PG-rated shows were deemed inappropriate for 8- to 12-year-olds.” *Walsh Study*.

IV. CHILDREN'S ADVERTISING PROTECTIONS MUST BE UPDATED FOR DIGITAL TELEVISION

The Commission has already concluded that the CTA's advertising limits apply to digital broadcasters and that "[d]igital broadcasters must also continue to comply with [its] policies regarding program-commercial separation, host selling, and program-length commercials."⁸⁴ The remaining issue in this proceeding is "how these requirements should be interpreted and adapted with respect to digital broadcasting in light of the new capabilities made possible by that technology."⁸⁵ Recent developments regarding interactivity provide a better basis to understand how interactive advertising could violate the Commission's advertising policies for children and how such policies need to be updated to address the new capabilities and the potential for unfair practices.

A. Recent Developments Reinforce the Need to Clarify the Children's Advertising Policy for Digital Television

Although interactive advertisements made possible by digital television are still being developed, children are likely to be a primary audience. Children are already targets of interactive advertising in other media, such as the Internet, which provide interactive capabilities similar to those that will likely develop in digital television. Moreover, new technologies and software have the capability to collect data necessary about the viewing habits and interests of specific children without the knowledge or consent of either the children or their parents. This data can be used to target advertisements to children regardless of the programs they are watching and to facilitate impulse buying of products featured in programming or advertising.

⁸⁴ *Children's DTV NPRM*, 15 FCC Rcd at 22,951 (footnotes omitted).

⁸⁵ *Id.*

1. Children Are Already Targets of a Variety of Interactive Advertisements

A recent article in the *Washington Post* describes how advertisers are using online games to entice child customers.⁸⁶ It cites the a recent example involving Nickelodeon:

Nickelodeon, the popular kids cable network, wanted to draw more attention to the launch of its “Jimmy Neutron” series last year. So during the summer it partnered with Quaker Oats, among others, to create the “Jimmy Neutron Gotta Blast” online racing game.

To play, kids needed a code from inside a cereal box to access Nick’s Web site and build their own rocket. To sweeten the offer, Nick promised that some of the rockets would be chosen at random to race on-air.⁸⁷

This type of marketing is known as an “advergame.” Another example of an advergame is Candystand.com, a website sponsored by LifeSaver featuring games involving its candy brands, which gets more than 1 million unique visitors per month.⁸⁸ Burger King also has an advergame in which characters from Nickelodeon’s Rugrats race around a track to avoid capture by the Reptar monster.⁸⁹

Advergames can be found on major game sites such as Microsoft’s gaming zone as well as product web sites.⁹⁰ According to a *New York Times* report, “[s]ome games even permit advertisers to monitor players without their knowledge, providing general information about how long consumers play and what choices they make in the games. For instance, car makers may want to know what makes, models, and colors of cars players choose to race.”⁹¹

⁸⁶ Ellen Edwards, *Plug (the Product) and Play; Advertisers Use Online Games to Entice Customers*, Wash. Post Jan. 26, 2003, at A1 (“Edwards”).

⁸⁷ *Id.* According to this article, the promotion was a success: “more than a half-million people played [the] game and the series launch was the highest rated in the network’s history.” Nickelodeon plans to use advertgames to promote a SpongeBob event. *Id.*

⁸⁸ *Id.*

⁸⁹ Michel Marriott, *Playing with Consumers*, N.Y. Times, Aug. 30, 2001, at G1 (“Marriott”).

⁹⁰ *Id.*

⁹¹ *Id.*

Advergames are catching on for a variety of reasons. One is the popularity of video games.⁹² Another is cost: “Advergames can reinforce a brand image, build a database of information about its users, directly target the market they want to hit—all very inexpensively when compared to what it costs to advertise in other media.”⁹³ Often the target is young people, for as one advergaming developer explains: “The youth are the biggest influencers of consumer brands. They’re what defines what cool is.”⁹⁴

Still another reason for the success of advertgames is that they can get the attention of people who skip or ignore regular television commercials. According to one researcher: “With games, they are absolutely absorbed in the games. With research, you can find out the type of people who are playing, and they’re paying attention. There is very little evidence that people playing games are multitasking. And that’s what marketers are interested in—capturing their attention.”⁹⁵

The CEO of an advergaming producer summarizes the marketing advantages of advergaming:

You can engage people in your brand for 15 to 20 minutes . . . And there’s greater retention when it’s interactive. Your cost per minute is also significantly lower than it is for a broadcast ad. Plus you reach the *youth demographic*.⁹⁶

Besides advergaming, another kind of interactive advertising being tested with children is called a “webisode.”⁹⁷ Mattel used this technique to launch the “My Scene Barbie” in November 2002.

⁹² Electronic games are so popular that they brought in more revenues last years than movie ticket sales. *Id.*

⁹³ *Edwards* at A1.

⁹⁴ *Marriott* at G1.

⁹⁵ *Edwards* at A1.

⁹⁶ *Id.* (emphasis added).

⁹⁷ *Id.*

This is Barbie with a bare belly and cell phone, Barbie aimed a older girls, ages 7 to 12, the ones already instant-messaging.

In the first ad, the Barbie is in a cab yakking on her cell. A cute guy flags the cab done as she gets out. But – OH, NO! She realizes as the cab pulls away that her prize possession, her very lifeline – her cell phone – is still in it.

“To Be Continued,” ends the television ad.

But it’s continued only on myscene.com.⁹⁸

Approximately one million girls visit this web site each month where they can view subsequent episodes. At the website, they can also send e-card to their friends, a practice known as “viral marketing.”⁹⁹

Another marketing technique aimed at children is the placing of products in electronic games. For example, McDonalds and Intel have bought product placements in the top-selling game, “Sims.” Jeep has purchased placements in the Tony Hawk Skateboard games.¹⁰⁰

It is easy to see from these examples how interactive digital television could be used to advertise to children. As the head of future TV at the BCC’s children’s division points out, “children’s programming is going to be at the forefront of the development of interactive TV... Kids don’t find in difficult to interact with TV.”¹⁰¹ Thus, it is not surprising to learn that companies such as Cola-Cola, with its fruit drink brand Capri-Sun targeted to seven to eleven year olds, has its digital media agency investigating the possibilities of interactive television.¹⁰²

In the United Kingdom, where mobile phone penetration is higher than in the United States, Nickelodeon has also used mobile phones to promote its programs to children. For example, in 2001 it sent out a teaser message to kids telling them to tune into a new series of

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ Richard Jolley, *Get Them While They’re Young—Interactive TV Allows Companies to Involve Children in a Two-Way Communication with their Brands*, *Revolution*, Mar. 13, 2002, at 26.

¹⁰² *Id.*

“Sabrina the Teenage Witch.”¹⁰³ It also sent out alerts about “Watch Your Own Week” that allowed children to vote for the programs they wanted to watch using their mobile phones.¹⁰⁴

While Nickelodeon has not used this capability to “exploit interactive brand sponsorship possibilities,” the possibilities are clearly there.¹⁰⁵ Some in the U.K. have also expressed fears that mobile phone users, especially young children, are being duped into replying to text messages via premium-rate SMS services by unscrupulous businesses.¹⁰⁶

2. Data Collection Will Allow Greater Targeting of Advertising and Direct Sales of Merchandise via Interactive Television

At the same time that new interactive advertising techniques are being developed, new technologies are permitting the collection of more information about individual viewers, and companies are using that information to target advertising very precisely. A Report by the Center for Digital Democracy details how interactive television can “provide advertisers the ability to target each individual viewer with personalized ads, thus increasing the likelihood of impulse purchasing.”¹⁰⁷ This Report demonstrates how “television programming content, marketing, and data collection are likely to be totally integrated.”¹⁰⁸ For example, Watchpoint Media, Inc. has developed tools that enable hyperlinking with “virtually any kind of information (purchase price, merchant logo, plot information, related pictures, even additional video streams) with moving objects that appear in television programs or advertisements.”¹⁰⁹

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ Center for Digital Democracy, *TV That Watches You: The Prying Eyes of Interactive Television* 3 (June 2001) (“CDD Report”).

¹⁰⁸ *Id.* at 5.

¹⁰⁹ *Id.* at 5 (quoting Watchpoint’s website).

The Report also explains how “large amounts of information about customers will be collected and used without their knowledge or, even with their knowledge, without their having the ability to prevent it.”¹¹⁰ Using a variety of new technologies and products, companies will be “able to collect detailed information about what each user of the system is doing, which shows they watch, when and how long they watch, what advertisements they see, whether they change channels during ads or shows, and more.”¹¹¹ One purpose of such data collection is to allow marketers to target different homes with different ads. Marketers can use the collected data to compile databases, profile their audience, and reach audiences with the desired characteristics. As one company claims on its website, “profiles enable advertisers to reach the ER audience any time of day, not just when ER is being broadcast.”¹¹² Presumably, these types of products could enable advertisers to target children whenever they are watching, whether or not the program is considered a children’s program, and to transmit advertisements for products that are designed to appeal to children. Advertisements could target children of a certain gender, age, household income, race, or by certain interests.

One such technology called iADs being already being utilized in the United Kingdom by NDS, a company owned by News Corp.

iADs creates a new level on top of traditional video commercials which enables viewers to interact with advertisements. At the same time, iADs targets specific groups of viewers and gives them the address of the nearest store selling your product. iADs encourages impulse buying during an ad or program, and

¹¹⁰ *Id.* at 7. For example, the Report describes a patent for a system that could track every cable channel and program that a subscriber views. Such information could be combined with marketing databases that track buying habits by zipcode to send ads targeted to individual households. *Id.* at 5-6. The Report also describes other “personalization software” being used by DirecTV, AT&T Broadband and others.

¹¹¹ *CDD Report* at 11.

¹¹² *Id.* at 16 (*quoting* website of MbTV).

simplifies responding because viewers just push a button on their remote control.¹¹³

Another product, Qpass, is being developed to allow digital subscribers to purchase on-screen items without having to enter credit card information.¹¹⁴

B. The Commission Should Adapt the Existing Children's Television Rules and Policies for the Digital Age

Many of the marketing practices described above would violate the Communications Act, the Commission's advertising policies and rules, and, in some instances, the Children's Online Privacy Protection Act (COPPA), if they were done by a digital broadcasters targeting children.

One of the fundamental principles underlying Section 317 of the Communications Act is that people are entitled to know when they are being advertised to and by whom.¹¹⁵ Extensive research has established that young children's limited cognitive development places inherent limitations on their ability to recognize and defend against television commercials.¹¹⁶ For example, children below 7-8 years of age do not recognize the persuasive intent of advertising, and thus tend to accept commercial appeals as accurate, truthful, and unbiased. As a result, they are uniquely vulnerable to commercial influence.¹¹⁷ Because children are less able to understand the persuasive intent of television advertising, the Commission has long had special policies to ensure clear separation of program and advertising content.¹¹⁸ Not only is such separation

¹¹³ *Id.* at 20 (quoting the NDS website).

¹¹⁴ *Id.* at 15.

¹¹⁵ 1974 *Children's Television Report and Policy Statement*, 50 FCC 2d 1, 14-15 (1974).

¹¹⁶ Dale Kunkel & Don Roberts, *Young Minds and Marketplace Values: Research and Policy Issues in Children's Television Advertising*, 47 *Journal of Social Issues* 57-72 (1991).

¹¹⁷ Dale Kunkel, *Children and Television Advertising*, *Handbook of Children and the Media* 375-393 (Dorothy Singer & Jerome Singer, eds. 2001).

¹¹⁸ *Id.* at 15.

necessary to avoid taking advantage of children, but it also helps to ensure that the programming itself is designed to entertain or inform rather than to promote products.¹¹⁹

The above examples illustrate how the lines between program content and marketing have become blurred. While studies show that “children typically begin to understand the persuasive intent of television advertising around the age of seven or eight,” a recent study “suggests that even children 9-11 years may not be aware of the commercial intentions of many Web sites, and in particular, the branded environment phenomenon.”¹²⁰ Thus, if anything, requiring clear separation between content and advertising is more important than ever.

Section 303a of the Communications Act prohibits broadcasters from airing more than a certain number of minutes of advertising per hour on programs directed at children.¹²¹ The D.C. Circuit has made it clear that when it comes to limiting advertising to children, the Commission may not rely on market forces.¹²² Some of the above examples, such as the advertgames, provide the potential for exposing children to excessive advertising.

1. The Rules Should Prohibit Links from Children’s Programming to Commercial Websites and Other Forms of Interaction Involving Product Promotion

To both provide a clear separation and to limit advertising exposure, CME concluded in earlier comments that the best course of action would be for the Commission to clarify that direct links from children’s programs to commercial websites would violate the advertising limits and

¹¹⁹ *Id.* at 16-17.

¹²⁰ Ellen Wartella *et al.*, Markle Found., *Children and Interactive Media, A Compendium of Current Research and Directions for the Future: A Report to the Markle Foundation* 86 (May 2000).

¹²¹ 47 USC § 303a(b).

¹²² *Action for Children’s Television v. FCC*, 821 F.2d 741, 745 (D.C. Cir. 1987).

separation policies.¹²³ Children Now suggested requiring a clear separation between the programming and advertising that would prevent children from clicking on an advertisement directly from a program.¹²⁴ Based on further research, Children Now believes that the better approach is to simply prohibit links from children's programs to commercial websites. Thus, all of the Coalition members now support a prohibition on links from children's programs to commercial websites because it would both better protect children and be easier to administer.

2. The Rules Should Prohibit the Collection of Personally Identifiable Information and Other Information that Facilitate Targeted Marketing to Children

The Coalition is also concerned that digital television could provide broadcasters with both the incentive and ability to evade children's advertising policies. For example, the advertising limits apply only to children's programs defined as "programs originally produced and broadcast primarily for an audience of children 12 years old and younger."¹²⁵ However, with the ability to profile viewers and target advertisements based on age, gender, family income and other factors, advertisers could target ads to children watching programs that are not considered children's programs. To ameliorate this problem, the Commission should prohibit the collection of information from children and/or the use of such information to target children.

This proposed rule is consistent with and expands upon the Children's Online Privacy Protection Act (COPPA).¹²⁶ In general, COPPA prohibits commercial websites and online services that are directed at children from collecting personally identifiable information from

¹²³ CME Comments at 31-38.

¹²⁴ Children Now Comments at 37-42.

¹²⁵ 47 CFR § 73.670, note 2.

¹²⁶ P.L. 105-277, codified at 15 USC § 6501, *et seq.*

children without their parents' consent.¹²⁷ To the extent that a child uses a link on non-children's television programs to go to a commercial website directed to children, the protections of COPPA would apply. Because knowledge of the law by both parents and companies is essential to compliance, we urge the Commission to publicize how COPPA applies to digital television for the benefit of both industry and parents.

However, the Children's Media Policy Coalition is concerned that not every type of information collected from children watching DTV would fall within the scope of COPPA.¹²⁸ For example, COPPA's protections are limited to "personal information."¹²⁹ However, as described above, products are now available (or are being developed) that may allow advertisers to target individuals without necessarily collecting "personal information" as defined in the COPPA Rule. These technologies will allow marketers to unfairly manipulate children by targeting advertisements to them whenever they are watching television. Thus, the Commission must act to directly prohibit such manipulation.

¹²⁷ 15 USC § 6502(a)(1).

¹²⁸ COPPA's restrictions apply to operators defined as "any person who operates a website located on the Internet or an online service." 15 USC § 6501(2). The Act defines the term "Internet" but does not define the terms "website" and "online services." The Federal Trade Commission rules indicate that a broad definition is intended. The FTC rules implementing COPPA state that the definition of "Internet" is intended to broadly apply to any conceivable successor to the Internet and is not limited to current access mechanisms. 64 Fed. Reg. 59,888, 59,912 (1999).

¹²⁹ "Personal information means individually identifiable information about an individual collected online." 16 CFR § 312.2. The definition lists a number of examples including first and last name, home address, and e-mail address.

3. The Rules Should Prohibit Direct Sales to Children

Finally, interactive television permits the direct sale of merchandise to children, which was not previously a problem with conventional television.¹³⁰ The Guidelines of the Children's Advertising Review Unit require that "advertisers who transact sales with children online should make reasonable efforts in light of all available technologies to provide the person responsible for the costs for the transaction with the means to exercise control over the transaction. If there is no reasonable means provided to avoid unauthorized purchases of goods and services by children, the advertiser should enable the person responsible to cancel the order and receive full credit without incurring any charges."¹³¹

The Coalition does not find this self-regulatory guideline to be sufficient. We are concerned that with DTV, "click through" ordering could be very easy for children. Combined with the enhanced ability to target children based on their particular interests and children's generally more impulsive behavior, it is virtually assured that children will make unauthorized purchases unless the Commission steps in to prevent such sales. It is simply not possible for parents to constantly monitor their children's activities at all times. Moreover, the ability to return an item once purchased is not sufficient remedy given the cost and inconvenience involved (and is not always possible, for example, when the child has already downloaded a game or ordered a pizza). We note the Independent Television Commission (ITC) in the United

¹³⁰ However, the experience with 900 numbers, another technology that allowed children to easily run up large bills without parental authorization, suggests the need for the FTC to take prophylactic action. Because of such abuses, Congress passed a law directing the FTC to prohibit the advertising of 900 number services to children under the age 12. *See generally* Angela J. Campbell, *Ads2Kids.Com: Should Government Regulate Advertising to Children on the World Wide Web?* 33 Gonzaga L.Rev. 311, 316-318 (1997/98).

¹³¹ The CARU Guidelines may be found at www.caru.org. Compliance with these guidelines is voluntary.

Kingdom has prohibited direct sales to children by means of interactive television.¹³² The Commission should adopt a similar prohibition.

CONCLUSION

For the foregoing reasons, the Children's Media Policy Coalition respectfully requests that the Commission promptly adopt public interest requirements for digital broadcasters that will 1) better meet children's needs for educational and informational needs by establishing the principle that any increase in channel capacity that broadcasters choose to implement in the form of multicasting should translate to a commensurate increase in the amount of programming available to children; 2) ensure that children in cable and DBS households also have access to digital E/I programming; 3) provide parents with the information they need to help their children make appropriate viewing choices, by among other things, requiring greater promotion of E/I programming and establishing an advisory committee to examine how to improve the ratings system; and 4) update children's advertising rules and policies to take account of the additional capabilities of digital television.

¹³² Guidance to Broadcasters on the Regulation of Interactive Television Services (Feb. 2001), available at

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